Supreme Court, U. S.
FILED
MAY 20 1980
MICHAEL RODAK, JR., CLERK

No. 79-1400

In the Supreme Court of the United States

OCTOBER TERM, 1979

GARY TOUGHILL, MARGUERITE COSTANZA AND SAUNDRA NAVARRO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1400

GARY TOUGHILL, MARGUERITE COSTANZA AND SAUNDRA NAVARRO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that under the Double Jeopardy Clause their retrial on certain counts of an indictment upon which the jury at their first trial could not reach a verdict is barred by their acquittal at that trial on other counts of the indictment. They also contend that retrial is barred by deliberate overreaching by the government at the first trial.

In a four count indictment filed in the United States District Court for the Southern District of California, petitioners and six others were charged with conspiracy to import cocaine (21 U.S.C. 963), conspiracy to distribute cocaine (21 U.S.C. 846), illegal importation of cocaine (21 U.S.C. 952), and possession of cocaine with intent to distribute it (21 U.S.C. 841(a)(1)). After a jury trial, all petitioners were acquitted on the substantive importation count and petitioners Costanza and Navarro were also acquitted on the importation conspiracy charge. The jury

was unable to reach a verdict as to the remaining counts, and the court declared a mistrial. The government declared its intention to retry petitioners on the remaining counts. Petitioners then filed motions to dismiss the indictment on double jeopardy grounds. The district court denied the motions, and the court of appeals affirmed (Pet. App. 3-10). The case was remanded to the district court, where retrial is set for May 28, 1980.

1. Petitioners contend (Pet. 8-27) that retrial on the counts charging conspiracy to distribute and possession with intent to distribute cocaine is barred by the Double Jeopardy Clause in view of their acquittals for importation and conspiracy to import cocaine. The court of appeals correctly rejected this contention because the offenses for which petitioners are to be retried are not the "same" as the offenses for which they were acquitted.

The Double Jeopardy Clause prohibits a second trial following an acquittal for the "same" offense. See *Burks* v. *United States*, 437 U.S. 1, 11, 16 (1978); *Sanabria* v. *United States*, 437 U.S. 54, 64 (1978); *United States* v. *Scott*, 437 U.S. 82, 91 (1978). The test for determining whether two statutory provisions define the same or different offenses was stated in *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932). The test is satisfied "[i]f each [provision] requires a proof of a fact that the other does not * * * notwithstanding a substantial overlap in the proof offered to establish the crimes." *Iannelli* v. *United States*, 420 U.S. 770, 785 n.17 (1975).

Petitioners' contention can best be considered by treating separately the charges on which they are to be retried.

a. The *Blockburger* test is clearly met with respect to the count charging possession of cocaine with intent to distribute it. That offense requires proof of actual or constructive possession but does not require proof of actual importation (necessary to establish the substantive

importation charge) or of an agreement (necessary to establish conspiracy to import). Thus, a person can be guilty of possessing a controlled substance with intent to distribute it without having imported or conspired to import the controlled substance. See *United States* v. *Dubrofsky*, 581 F. 2d 208, 213 (9th Cir. 1978); *United States* v. *Garcia*, 589 F. 2d 249, 251 (5th Cir.), cert. denied, 442 U.S. 909 (1979). Accordingly, retrial on the possession count is plainly proper.[1]

b. Petitioners contend that the conspiracy to distribute cocaine and the conspiracy to import cocaine are in fact one and the same offense. They argue that a single conspiracy with two objects—to import and distribute cocaine—was arbitrarily split into two separate conspiracy counts, that the same overt acts were alleged to support each conspiracy count, and, therefore, that their acquittal of conspiracy to import bars their retrial for conspiracy to distribute.[2] This contention falls for two independent reasons.

First, as the court of appeals correctly held (Pet. App. 6-7), conspiracy to import a controlled substance, in violation of 21 U.S.C. 963, and conspiracy to distribute a controlled substance, in violation of 21 U.S.C. 846, are two separate and distinct offenses requiring proof of different elements. The fact that conspiracy, instead of substantive, offenses are involved is irrelevant for

---

[1]In addition, we note that petitioners do not argue—nor could they—that their acquittal for importation and conspiracy to import created a collateral estoppel bar to their retrial for the offense of possession with intent to distribute. The jury's verdict on the importation-related charges did not determine that petitioners had not possessed cocaine with intent to distribute it. See *Sanabria* v. *United States*, *supra*, 437 U.S. at 73 n.31. To the contrary, the fact that the jury hung on the possession charge establishes that the jury did not determine the facts relating to that charge favorably to petitioners.

[2]This argument is unavailable to petitioner Toughill, who was not acquitted of conspiracy to import.

purposes of determining whether the offenses are the "same" within the meaning of the Double Jeopardy Clause. Assuming that there was only one "agreement" with two criminal objects, this case is indistinguishable from one in which a defendant is prosecuted separately for a single "act" or "transaction" that violates two substantive statutes with distinct elements. It is settled that reprosecution is permissible unless the second prosecution involves the "same offense" or relitigation of factual issues already resolved favorably to the defendant by the first. See *Brown* v. *Ohio*, 432 U.S. 161, 164-169 (1977); *Ashe* v. *Swenson*, 397 U.S. 436 (1970).

This is not a case like *Braverman* v. *United States*, 317 U.S. 49 (1942), in which the government charged the defendant with several violations of a single general conspiracy statute based on one agreement to commit a number of different substantive offenses. In *Braverman*, the Court concluded that the offense defined by Congress in the general conspiracy statute was an agreement to commit one or several unlawful acts. This case, on the other hand, involves two specific conspiracy statutes, each of which proscribes an agreement to accomplish a different unlawful object. In such cases, separate conspiracy charges are proper. See *American Tobacco Co.* v. *United States*, 328 U.S. 781, 788 (1946).[3]

---

[3]Accordingly, the cases cited by petitioners (Pet. 10, 12, 13-18), involving successive prosecutions of two conspiracies charged under the same statutory provision and with the same unlawful objects, are inapposite.

We note that most courts that have considered the question have concluded that Congress intended violations of Sections 846 and 963 to be punished separately. See *United States* v. *Rodriguez*, 612 F. 2d 906 (5th Cir. 1980) (en banc); *United States* v. *Garner*, 574 F. 2d 1141, 1147 (4th Cir.), cert. denied, 439 U.S. 936 (1978); *United States* v. *Houltin*, 525 F. 2d 943, 951 (5th Cir. 1976), vacated on other grounds *sub nom. Croucher* v. *United States*, 429 U.S. 1034 (1977); *United States* v. *Marotta*, 518 F. 2d 681, 684-685 (9th Cir. 1975); but see *United States* v. *Honneus*, 508 F. 2d 566, 569 (1st Cir. 1974), cert.

Moreover, even if petitioners were correct that the indictment was multiplicitous, it would not follow that the acquittal on the importation conspiracy would bar retrial on the distribution conspiracy charge. Given the jury's failure to acquit petitioners of conspiracy to distribute cocaine, the jury's verdict reflects that there was a unanimous finding of insufficient evidence only on the importation aspect of the conspiracy, but that at least some jurors believed that there was sufficient evidence on the distribution aspect. Accordingly, if the conspiracy charges had been submitted to the jury in a single count, the jury would not have acquitted petitioners, but would have been unable to reach a verdict on that count, and petitioners would still be subject to retrial on that count.

Petitioners' reliance (Pet. 19-26) on *United States* v. *Guido*, 597 F. 2d 194 (9th Cir. 1979), is misplaced. In that case, the court, without reaching the defendants' double jeopardy claim, exercised its supervisory power to dismiss a conspiracy indictment brought by the government in one district following the defendants' entry of a guilty plea to a conspiracy charge in another district, where the two indictments involved the same objectives, the same key participants, the same source, means, locations and time frame. Whatever the merits of that decision, here, in contrast to *Guido*, as the court below concluded (Pet. App. 9), "there has been no arbitrary temporal division of a single conspiracy by an overeager prosecutor in order to facilitate multiple prosecutions." Petitioners were subjected to only one prosecution in which the two conspiracy counts were tried simultaneously. They are being retried on the distribution conspiracy only because

---

denied, 421 U.S. 948 (1975); *United States* v. *Adcock*, 487 F. 2d 637 (6th Cir. 1973). Even those courts that have held consecutive sentences impermissible, however, have not required the government to charge violations of the two statutes in a single count. See *United States* v. *Honneus*, *supra*, 508 F. 2d at 570.

the jury was unable to reach a verdict on that count at the first trial. See *United States* v. *Larkin*, 605 F. 2d 1360, 1367-1368 (5th Cir. 1979). "In short, this case lacks the inherent 'unfairness' that prompted the court to reverse the convictions in *Guido*" (Pet. App. 9) and provides no occasion for the exercise of any supervisory power the courts may enjoy.[4]

2. Petitioners' second claim (Pet. 27-36)—that the instant indictment represents prosecutorial over-reaching—is insubstantial. In rejecting this contention the court of appeals correctly observed (Pet. App. 10) that "[c]harging four separate offenses in violation of four separate and distinct criminal statutes cannot be termed prosecutorial overreaching. Nor does this appear to be a case where the prosecution covertly sought a mistrial for an opportunity to strengthen its case." Since petitioners were not convicted on any of the charges at the first trial, and in fact were acquitted on certain counts, we fail to perceive how they were victimized at that trial by prosecutorial overreaching. In addition, petitioners offer no evidence to support their claim that the prosecutor in the first trial deliberately provoked a mistrial by causing the jury not to reach a verdict on the remaining counts.[5]

---

[4]Even if the decision below conflicts with *Guido*, this Court does not sit to resolve intra-circuit conflicts. *Wisniewski* v. *United States*, 352 U.S. 901 (1957).

[5]Petitioners suggest (Pet. 31) that the government intends to call additional witnesses at their retrial. The government represented in its brief in the court of appeals that co-defendant Salvatore Pepe, a fugitive at the time of petitioners' trial, has since pleaded guilty to one count of the indictment and has agreed to testify at the retrial. There is nothing improper in the introduction at a retrial of newly obtained evidence that was not presented at the first trial. See *United States* v. *Shotwell Manufacturing Co.*, 355 U.S. 233, 243 (1957). Furthermore, there is no indication, nor is it logical to assume, that the government deliberately manipulated the jury into a deadlock on some of the charges at the first trial in the hope that Pepe would be apprehended and convinced to testify for the government at the second trial.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MAY 1980